

Shane P. Coleman
Michael P. Manning
HOLLAND & HART LLP
401 North 31st Street
Suite 1500
P.O. Box 639
Billings, Montana 59103-0639
Telephone: (406) 252-2166
Fax: (800) 565-7845

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

HYUNDAI MOTOR FINANCE)	Cause No. CV 09-91-BLG-CSO
COMPANY,)	
)	PLAINTIFF’S PRELIMINARY
Plaintiff,)	PRETRIAL STATEMENT
)	
vs.)	(Fed. R. Civ. P. 26(a);
)	Local Rule 16.2(b))
R. NICK GUTIERREZ)	
)	
Defendant.)	
)	

Plaintiff, Hyundai Motor Finance Company (“HMFC”) submits the following Preliminary Pretrial Statement, pursuant to Fed. R. Civ. P. 26(a) and Local Rule 16.2(b).

1. Factual Outline

This is a routine breach of contract claim. HMFC is a lender that provides financing in the automotive industry, including “floor plan” financing for automobile dealers. On July 27, 2005, Defendant, R. Nick Gutierrez (“Gutierrez”), personally guaranteed an Inventory Loan and Security Agreement (“Loan Agreement”) that included “floor plan” financing on behalf of Incredible Auto Sales, LLC formerly dba “Incredible Kia” in Billings, Montana. At the same time Gutierrez executed an Inventory Loan and Security Agreement Interest Rate and Charges Addendum (“Addendum”) on behalf of Incredible Auto Sales, LLC, and a Continuing Guaranty and Subordination Agreement (“Personal Guaranty”). The Loan Agreement granted HMFC security interest in substantially all of the assets of Incredible Kia, including the motor vehicle inventory.

In October 2006, HMFC learned that Incredible Kia had breached the terms of the Loan Agreement, *inter alia*, by selling vehicles out of trust, by “double-flooring” vehicles with other lenders, and by altering funding information for vehicles. On October 17, 2006, Incredible Kia filed a Chapter 11 bankruptcy with the U.S. Bankruptcy Court, District of Montana, as case no. 06-60855-RBK. On January 24, 2007, the Bankruptcy Court confirmed a sale of certain assets of Incredible Kia. Most of the proceeds of the sale were paid to HMFC as the senior secured lender. Other collateral was liquidated and their proceeds were applied to

HMFC's loan. The proceeds from the sale of the various collateral was not sufficient to cover the debt to HMFC. HMFC has demanded payment of the deficiency under the terms of the Personal Guaranty, but Gutierrez has failed to make such payment.

As of May 2008, approximately \$173,461.01 in principal and interest remains unpaid under the Loan Agreement. Interest continues to accrue at annual rate as set forth in the Addendum. Additionally, HMFC expended \$142,137 in attorney fees, costs and other expenses in connection with preserving its collateral in connection with the underlying Incredible Kia bankruptcy.

2. Jurisdiction and Venue

Jurisdiction and venue are proper in this Court.

3. Factual Bases of Plaintiff's Claims

See above. This is a routine contract claim on a personal guaranty.

4. Legal Theories

Breach of contract; personal guaranty.

5. Computation of Damages

A deficiency of \$173,461.01 in principal and interest calculated on the basis of a 365 day year and actual numbers of days elapsed, established in the Addendum and attorney fees and costs of \$142,137.00 for a total of \$315,598.01 plus fees and costs accrued in this matter.

6. Early Neutral Evaluation

Early neutral evaluation would be helpful in this matter.

7. Related Litigation

There is no related litigation pending.

8. Proposed Stipulations of Fact and Law

HMFC proposes the following stipulations of fact and law:

1. On July 27, 2005, Gutierrez signed the Loan Agreement on behalf of Incredible Kia.
2. On July 27, 2005, Gutierrez signed the Addendum on behalf of Incredible Auto Sales, LLC.
3. On July 27, 2005, Gutierrez signed the Personal Guaranty.
4. HMFC's security interest in substantially all of the assets of Incredible Kia, including the motor vehicle inventory is perfected with the Montana Secretary of State's Office.
5. On October 17, 2006, Incredible Kia filed a Chapter 11 bankruptcy petition with the U. S. Bankruptcy Court, District of Montana as case no. 06-60855.

9. Deadlines for Joinder

HMFC suggests that the deadlines for joining parties and amending claims should be two weeks after the Preliminary Pretrial Conference.

10. Issues Suitable for Pretrial Disposition

All claims in the Complaint will be the subject of motions for summary judgment or motions for judgment on the pleadings.

11. Individuals with Knowledge

To date, HNFC is aware of the following individuals who may have knowledge of facts relevant to this matter:

- a. R. Nick Gutierrez
- b. Dale Ueno
- c. Sam Frobe
- d. Employees with Data Scan
- e. Steve Marks
- f. Former employees of Incredible Kia and Graham Staunton

12. Documents

HMFC identifies the following documents that may be used in proving hits claims:

- a. Inventory Loan and Security Agreement dated July 27, 2005;
- b. Hyundai Motor Finance Company Inventory Loan and Security Agreement Interest Rate and Charges Addendum dated July 27, 2005;
- c. Continuing Guaranty and Subordination Agreement dated July 27, 2005;
- d. Order Conditionally Permitting Sale of Assets Under 11 U.S.C. § 363;
- e. Bankruptcy Court Pleadings in Case No. 06—60855-RBK.

13. Insurance

HMFC is unaware of any insurance policies that would cover the claims in the Complaint.

14. Settlement Prospects

HMFC has not been involved in settlement discussions with Gutierrez.

15. Suitability of Special Proceedings

HMFC anticipates no need for special proceedings in this matter.

Respectfully submitted this 23rd day of October, 2009.

/s/ Shane P. Coleman
HOLLAND & HART LLP

ATTORNEYS FOR PLAINTIFF

**CERTIFICATE OF SERVICE
L.R. 5.2(b)**

I hereby certify that, on October 23, 2009, a copy of the foregoing document was served on the following persons by the following means:

1, 2 CM/ECF

_____ Hand Delivery

_____ Mail

_____ Overnight Delivery Service

_____ Fax

_____ E-Mail

1. Clerk, U.S. District Court

2. Stephen C. Mackey
smackey@tbems.com

/s/ Shane P. Coleman
Shane P. Coleman
Holland & Hart LLP